LEE SENG HOCK

v.

FATIMAH ZAIN

COURT OF APPEAL, KUALA LUMPUR
DATO' SHAIK DAUD MOHD. ISMAIL JCA
DATO' SITI NORMA YAAKOB JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM JCA
[CIVIL APPEAL NO: P-02-742-95]
20 SEPTEMBER 1996

CONTRACTS: *Conditional contract - Sale and purchase of land - Fundamental change in circumstances - Impossibility of performance - Whether contract frustrated - Whether parties discharged - Doctrine of frustration - Principles - Deposit paid under contract - Whether an advantage received under a void contract - Whether refundable - Contracts Act 1950 ss. 57(2), 66.*

The appellant, the registered proprietor of a 1/2 share in a piece of land, had wanted to buy out the other 1/2 share which formed the estate of one Hatijah bt Haji Jusoh (the deceased). In December 1979, the appellant signed a sale and purchase agreement with the administratrix of the deceased's estate (the respondent), and thereupon paid 10% of the purchase price.

By the agreement, the sale of the 1/2 share to the appellant was made conditional upon the respondent obtaining (i) a Kadhi's Certificate to determine the beneficiaries of the estate (ii) a Court order to sanction the sale. The respondent had not been able to obtain the Court order but succeeded in getting the Kadhi's Certificate. The Certificate obtained, however, distributed the deceased's estate into equal shares between the respondent and Bait-ul-Mal, with the result that, in respect of the whole property, the respondent was only beneficially entitled to a 1/4 share.

In May 1994, the whole of the property was acquired by the Government under the Land Acquisition Act 1960, and following that, the Collector made the compensation that (i) RM194,628 be paid out to the appellant for his 1/2 share of the property (ii) RM97,314 be paid out to the respondent for her 1/4 share of the property (ii) RM97,314 be paid to the respondent, as the administratrix of the estate, for the other 1/4 share of the property.

The appellant claimed that by virtue of the agreement, he was also entitled to the compensation payable to the respondent (for her 1/4 share), and so, filed an application for such relief. The learned Judge, dismissing the application, ruled that the two latter sums rightly belonged to the respondent and Bait-ul-Mal respectively. The appellant appealed and the main issue that arose was whether the doctrine of frustration applied in the circumstances as to render

the agreement void and unenforceable, and discharge the parties of their obligations thereunder.

Held:

Per Siti Norma Yaakob JCA (delivering the judgment of the Court):

[1] A contingent contract is defined by s. 32 of the Contracts Act 1950 as "a contract to do or not to do something, if some event collatoral to the contract, does or does not happen". By s. 33(b) such contract is void if the event becomes impossible.

[2] In this case, there were two events that needed to be accomplished namely the obtaining of the Kadhi's Certificate and the obtaining of the Court Order sanctioning the sale. Although the Kadhi's Certificate was obtained, the manner of distribution prevented the sale of the deceased's 1/2 share in terms of the agreement. Clearly, the effect of the Kadhi's Certificate was to disable the respondent from fulfilling her obligation under the agreement to sell the deceased's 1/2 share of the property to the appellant.

[3] However, notwithstanding that the subject matter has been reduced by the Kadhi's Certificate, the agreement could still be enforced in March 1980 if the parties had then agreed to sell and purchase a reduced portion of the property with a corresponding reduced price, and had the agreement varied. This, however, did not happen as the appellant was intent on acquiring the whole 1/2 share, to which the Bait-ul-Mal was also beneficially entitled.

[4] As for the doctrine of frustration, the test applicable is that, where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and is not discharged by frustration.

[5] In this case, the compulsory acquisition of the land was an event that could not have been contemplated by the parties. The acquisition had radically changed the obligation of the respondent to sell 1/2 share of the land to the appellant, as what was agreed and intended by the parties and affirmed by the agreement is a transfer of a 1/2 share of the property.

[6] Indeed, when the land was compulsorily acquired and compensation awarded, the subject matter of the agreement ceased to exist and performance of the agreement became impossible. For this reason, the compulsory acquisition of the land had frustrated the agreement as to discharge both the appellant and respondent of their obligations under the agreement.

[7] Since the subject matter of the agreement has been taken away and replaced by way of compensation payable, the appellant cannot claim such compensation as being due and payable to him. The basis of the appellant's claim is dependant on the agreement, but since the agreement was void under s. 57(2) of the Contracts Act 1950, the respondent cannot claim any right to such compensation. He is only entitled to be refunded the 10% deposit he had paid to the respondent by virtue of s. 66 of the Contracts Act.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Kontrak bersyarat - Penjualan dan pembelian tanah - Perubahan asas dalam keadaan - Ketidak-mungkinan perlaksanaan - Samada kontrak terkecewa - Samada pihak-pihak dilepaskan - Doktrin kekecewaan - Prinsip-prinsip - Deposit di bayar di bawah kontrak - Samada suatu kelebihan di terima di bawah satu kontrak yang batal - Samada boleh dibayar-balik - Akta Kontrak 1950 ss. 57(2), 66.*

Perayu, yang merupakan tuanpunya berdaftar bagi ½ bahagian sebidang tanah, hendak membeli ½ bahagian yang lain yang mana merupakan harta pusaka seseorang yang bernama Hatijah bt Haji Jusoh (simati). Dalam bulan Disember, 1979 perayu telah menandatangani satu perjanjian jualbeli dengan pentadbir harta pusaka simati (responden), dan terus membayar 10% daripada harga belian.

Menurut perjanjian tersebut, penjualan ½ bahagian kepada perayu adalah tertakluk kepada syarat bahawa responden akan mendapatkan (i) Perakuan Kadhi bagi menentukan benefisiari-benefisiari harta pusaka tersebut (ii) perintah Mahkamah yang mengizinkan penjualan itu. Responden gagal mendapatkan perintah Mahkamah tetapi berjaya mendapatkan Perakuan Kadhi tersebut. Perakuan yang diperolehi itu, walaubagaimanapun, membahagikan harta pusaka simati sama rata di antara responden dan Bait-ul-Mal, dan akibatnya, berhubung dengan keseluruhan harta tersebut, responden hanyalah secara benefisialnya berhak kepada ¼ bahagian sahaja.

Dalam bulan Mei 1994, keseluruhan harta tersebut telah diambil oleh Kerajaan di bawah Akta Pengambilan Tanah 1960, dan berikutan itu, Pemungut telah membuat pampasan bahawa (i) RM194,628 hendaklah dibayar kepada perayu bagi ½ bahagiannya dari hartanah tersebut (ii) RM97,314 hendaklah dibayar kepada responden bagi ¼ bahagian hartanah tersebut (iii) RM97,314 hendaklah dibayar kepada responden, sebagai pentadbir harta pusaka tersebut, bagi ¼ bahagian yang lain hartanah tersebut.

Perayu telah menuntut bahawa menurut perjanjian tersebut, beliau adalah juga berhak kepada pampasan yang kena dibayar kepada responden (bagi ¼

bahagiannya), dan dengan itu telah memfailkan satu permohonan bagi mendapatkan relief yang sedemikian. Hakim yang bijaksana, dalam menolak permohonan tersebut memutuskan bahawa kedua-dua jumlah yang terkemudian secara sahnya kepunyaan responden dan Bait-ul-mal masing-masingnya. Perayu telah merayu dan isu utama yang berbangkit adalah samada doktrin kekecewaan terpakai dalam keadaan tersebut bagi menjadikan perjanjian tersebut batal dan tidak boleh dikuatkuasakan, dan melepaskan pihak-pihak tersebut dari kewajipan mereka di bawahnya.

Diputuskan:

Oleh Siti Norma Yaakob HMR (menyampaikan penghakiman Mahkamah):

[1] Sesuatu kontrak kontinjen ditakrifkan oleh s. 32 Akta Kontrak 1950 sebagai "satu kontrak untuk melakukan atau tidak melakukan sesuatu jika sesuatu peristiwa yang kolateral kepada kontrak tersebut, berlaku atau tidak berlaku". Menurut s. 33(b) kontrak yang sedemikian adalah batal jika peristiwa tersebut menjadi mustahil.

[2] Dalam kes ini, terdapat dua perkara yang perlu dilakukan, iaitu mendapatkan Perakuan Kadhi dan mendapatkan perintah Mahkamah yang menyetujui penjualan tersebut. Walaupun Perakuan Kadhi telah diperolehi, cara pembahagian menghalang penjualan ½ bahagian simati menurut kehendak perjanjian. Jelasnya, kesan Perakuan Kadhi tersebut adalah untuk tidak membolehkan responden memenuhi kewajipannya di bawah perjanjian tersebut untuk menjual ½ bahagaian simati dari hartanah tersebut kepada perayu.

[3] Namun begitu, walaupun hal-perkara (subject-matter) di sini telah menjadi kurang oleh Perakuan Kadhi tersebut, perjanjian itu masih boleh dikuatkuasakan dalam bulan Mac 1980 jika pihak-pihak tersebut ketika itu bersetuju untuk menjual dan membeli bahagian hartanah yang telah dikurangkan dengan kekurangan harga yang sekadarnya, dan mengubah perjanjian tersebut. Hal ini namun begitu tidak berlaku kerana perayu telah berniat untuk memperolehi keseluruhan ½ bahagian tersebut, terhadap mana Baitul-Mal adalah juga berhak secara benefisialnya.

[4] Berhubung dengan dokrin kekecewaan, ujian yang terpakai adalah bahawa,, di mana selepas sesuatu kontrak dimasuki terdapat penukaran keadaan tetapi keadaan yang berubah itu tidak menjadikan satu perubahan yang penting atau radical dalam kewajipan yang pada asalnya diakujanji sehingga menjadikan perlaksanaan kontrak tersebut sesuatu yang secara radikalnya berlainan daripada yang pada asalnya diakujanjikan, kontrak tersebut tidak menjadi mustahil, dan ianya tidak boleh dilepaskan kerana kekecewaan.

[5] Dalam kes ini, pengambilan wajib tanah tersebut adalah suatu peristiwa yang tidak mungkin telah dijangkakan oleh pihak-pihak tersebut. Pengambilan itu telah secara radikalnya mengubah kewajipan responden untuk menjual ½ bahagian tanah tersebut kepada perayu, kerana apa yang telah dipersetujui dan diniatkan oleh pihak-pihak tersebut dan diikrarkan oleh perjanjian itu adalah pemindahan ½ bahagian dari hartanah tersebut.

[6] Sesungguhnya, bilamana tanah telah secara wajibnya diperolehi dan pampasan diawardkan, hal-perkara perjanjian tersebut tidak lagi wujud dan perlaksanaan perjanjian itu menjadi mustahil. Atas alasan ini, pengambilan wajib tanah tersebut telah mengecewakan perjanjian itu sehingga melepaskan kedua-dua perayu dan responden dari kewajipan mereka di bawah perjanjian itu.

[7] Oleh kerana hal-perkara perjanjian tersebut telah dilucutkan dan digantikan dengan pampasan yang kena dibayar, perayu tidak boleh menuntut pampasan sedemikian sebagai menjadi kena dibayar dan harus dibayar kepadanya. Asas tuntutan perayu adalah bergantung pada perjanjian itu, tetapi oleh kerana perjanjian tersebut menjadi batal di bawah s. 57(2) Akta Kontrak 1950, responden tidak boleh menuntut apa-apa hak kepada pampasan yang sedemikian. Beliau hanya berhak untuk dibayar balik deposit sebanyak 10% tersebut yang telah beliau bayar kepada responden berdasarkan s. 66 Akta Kontrak.

[Rayuan ditolak]

Cases referred to:
Ramli bin Zakaria & Ors. v. Government of Malaysia [1982] 2 MLJ 257 ***(foll)***

Legislation referred to:
Administration of Muslim Law Enactment 1959 (Penang), s. 43 (since repealed)
Contracts Act 1950, s. 32, 33, 57(2), 66
Land Acquisition Act 1960, s. 14(1), 29(2)

For the appellant - Goik Kenzin; M/s. Malik & Partners
For the respondent - Lim Chee Wee; M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob JCA:

The principal issue raised in this appeal is whether the doctrine of frustration applies as to discharge the parties in these proceedings from their obligations under the sale and purchase agreement entered into between them. That issue arose from the following undisputed facts.

On 28 August 1974, the appellant became the registered proprietor of a ½ share in land held under Lot 569, GM 26, Mukim 7, Seberang Perai Tengah, Penang. The other ½ share formed the only asset of the estate of one Hatijah

binti Haji Jusoh, (the deceased) who died on 17 June 1924. The estate was administered by the deceased's husband, one Mat bin Musa but when he died on 12 December 1945 without fully administering the deceased's estate, the respondent, being the sole beneficiary took over the administration of the estate on 24 July 1975 and it was in her capacity as the Administratrix of her grandmother's estate that the respondent entered into a sale and purchase agreement (the agreement) with the appellant to sell the deceased's ½ share of the property to the appellant. By this sale, the appellant stood to be the proprietor of the whole property which covers an area of 4.5805 acres.

The agreement dated 19 December 1979 was subject to, *inter alia*, the following terms and conditions:

(1) Paragraph (c) of the preamble imposed an obligation to obtain a Kathi's Certificate to determine the persons entitled to share the estate and to their respective entitlements.

(2) Clause 1 fixed the purchase price at RM40,000 of which RM4000 representing 10% of the purchase price was paid by the appellant to the respondent at the time agreement was executed.

(3) Clause 2 provided for the balance of the purchase price of RM36,000 to be paid by the appellant within a period of two calendar months from the date of receipt of the notice by the appellant that an Order Court sanctioning the sale had been granted to the respondent.

The obtaining of the Order sanctioning the sale is again emphasised in clause 4(e) of the agreement being one of the preconditions of the sale and it was pursuant to this precondition, that the respondent, the Administratrix of the deceased's estate filed Originating Summons No. 633 of 1979 in the Penang High Court on 21 December 1979 seeking leave to enforce the agreement by the sale of the deceased's ½ share of the property to the appellant.

Nothing came of this application as subsequent events show that the application in its original form could not be proceeded with.

On 7 March 1980, the Kadhi Besar Penang acting under s. 43 of the Administration of Muslim Law Enactment, 1959 (since repealed) issued a "Sijil Feraid" distributing the ½ share of the property in the estate of the deceased to the respondent and Bait-ul-Mal in the proportion of a ½ share each. This meant that in respect of the whole property the respondent was entitled to ¼ share beneficially whilst the other ¼ went to Bait-ul-Mal.

The effect of the "Sijil Feraid" or Kathi's Certificate was to disable the respondent from fulfilling her obligation under the agreement to sell the deceased's ½ share of the property to the appellant. This led to numerous correspondence and meetings between the parties and the Religious Department in attempts to enforce the agreement. The appellant offered to purchase Bait-ul-Mal's ¼ share of the property but this sale never took place as the appellant

considered the value of RM153,000 asked for by the Religious Department to be exorbitant and prohibitive. On the other hand the Religious Department was prepared to purchase the respondent's ¼ share of the property for RM20,000 but this offer too was not taken up by the respondent. After that all attempts at a compromise with the Religious Department failed and the matter became a stalemate.

Up to 1991, no further action was taken on the matter until 20 February of the same year when the respondent obtained a Court order vesting the ¼ share of the property to her beneficially.

Then on 24 November 1992, the Religious Department wrote to the respondent requesting her as the Administratrix of the deceased's estate to obtain a Court Order to vest the other ¼ share of the property into the name of the Council of Muslim Religion, State of Penang in line with the "Sijil Feraid". This was not done and the situation remained the same until May 1974 when the whole property was acquired by the Government and acting under s. 14(1) of the Land Acquisition Act 1960, the Collector of Land Revenue, Daerah Seberang Perai Tengah (the collector) awarded the following compensation to the persons entitled thereto:

(1) RM194,628 to the appellant for his ½ share of the property

(2) RM97,314 to the respondent for her ¼ share of the property.

(3) RM97,314 to the respondent as the Administratrix of the estate of the deceased, for the other ¼ share of the property.

The appellant accepted the compensation for his ½ share of the property but since he was also making a claim under the agreement for the compensation payable to the respondent in her capacity as the beneficiary as well as the Administratrix, the collector by way of Originating Summons No. 24-624-94 filed in the High Court, Penang, deposited the two sums of compensation payable to the respondent into Court pursuant to s. 29(2) of the Land Acquisition Act, 1960.

In 1995, both the appellant and the respondent filed separate applications in the same Originating Summons praying for almost identical reliefs. They are:

(1) for leave to intervene in the proceedings.

(2) for an order that the two sums totalling RM194,628 paid into Court by the collector be paid out to them as the persons entitled thereto.

(3) and in the case of the appellant a sum of RM36,000 be paid out from the sums deposited to the respondent, this amount being the balance of the purchase price due under clause 2 of the agreement.

It is clear from these two applications that both the appellant and respondent consider themselves to be the persons entitled to receive the two sums and this dispute was resolved on 16 June 1995 when Yaakob Ismail J:

(1) allowed the respondent's application with costs and ordered that the deposited sum of RM97,314 being the compensation payable to her for her ¼ share of the property, be paid out to her less the sum of RM4,000 to be refunded to the appellant. RM4,000 represented the 10% deposit paid to the respondent by the appellant pursuant to clause 1 of the agreement.

(2) allowed the appellant to intervene but dismissed his claim to the deposited sums with costs as the two sums belong to the respondent and Baitul-Mal as compensation for their ¼ share each in the property.

It is to appeal against this order that the parties came before us.

At the outset of the appeal, Counsel for the appellant reiterated that his client is only claiming for the compensation due to the respondent beneficially less the balance of the purchase price of RM16,000 for the ¼ share and not to the amount awarded to her as the Administratrix as that amount rightly belongs to Bait-ul-Mal. The appellant took the stand that the agreement is still valid and subsisting despite the respondent's failure to obtain a Court Order sanctioning the sale and despite the fact that the whole land in question had since been compulsorily acquired by the Government. He argues further that the fact of the acquisition had not displaced his entitlement to the compensation awarded as the respondent held such compensation as a trustee for him less the balance of the purchase price due. By way of a rebuttal he maintained that the act of acquiring the whole land compulsorily had not frustrated the agreement as he was not claiming specific performance of the agreement. In this respect it is not disputed that the appellant had on 31 May 1994 sued the respondent for, *inter alia*, specific performance of the agreement in Kuala Lumpur Civil Suit No: S2-22-297-94 but the suit was discontinued on 14 December 1994.

A perusal of the agreement in its entirety shows it to be a contingent agreement as s. 4(e) contains the following provisions:

4. The sale and purchase agreement shall be subject to:

(a) ...

(b) ...

(c) ...

(d) ...

(e) The Order of Court sanctioning the sale hereto shall have been obtained by the vendor in favour of the purchaser or his nominee.

(f) ...

In addition there is also an obligation, no doubt by virtue of the estate being a Muslim estate, to obtain a Kadhi's certificate as to the distribution of the property and this is clear from paragraph (c) of the Preamble to the agreement which states as follows:

Whereas:

(a) ...

(b) ...

(c) The said Hatijah binti Haji Jusoh died on the 17 June 1924, an application will have to be made for a Kadhi Certificate relating to the distribution of the asset.

A contingent contract has been defined by s. 32 of the Contracts Act, 1950 (the Act) to be "a contract to do or not to do something, if some event collateral to the contract, does or does not happen." The effect of such a contract is stated by s. 33 of the Act to be as follows:

33(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

(b) If the event becomes impossible such contracts become void.

In this case there were two events that needed to be accomplished. The first was the obtaining of the Kadhi's Certificate and the second the obtaining of the Court Order sanctioning the sale. Both obligations either expressly or impliedly were to be initiated by the respondent.

The Kadhi's Certificate or "Sijil Feraid" dated 7 March 1980 was obtained but then the manner of distribution prevented the sale of the deceased's ½ share in terms of the agreement as Bait-ul-Mal was identified as a beneficiary together with the respondent, and entitled to share equally with the respondent the ½ share of the property belonging to the estate. By the very presence of this precondition the agreement the parties must have contemplated that the deceased's ½ share would vest entirely with the respondent, the sole heir and beneficiary thereby empowering her to sell the entire ½ share to the appellant. However the parties failed to appreciate that as the sole female heir of a Muslim estate, the respondent is not entitled to the entire ½ share of the deceased's property exclusively under Muslim law and in the absence of a male heir, the ½ share was apportioned equally with Bait-ul-Mal.

The question that arises from this is whether the agreement can be enforced in March 1980 given the situation that the subject matter has been reduced by the Kadhi's Certificate as the respondent can only sell her own beneficial interest of a ¼ share. We answer this positively if the parties agree to sell and purchase a reduced portion of the property with a corresponding reduced

price and by agreeing to do so vary the agreement. However the conduct of the appellant in attempting to purchase Bait-ul-Mal's ¼ share strongly indicates that he was not prepared to settle for something less and was intent in acquiring the whole ½ share for himself. It was only during the hearing in the Court below and before us that he indicated he was prepared to purchase a lesser portion of the land. Can he opt to do that? To answer this we have to look at the agreement particularly the provisions relating to the other precondition to be fulfilled this being the obtaining of the Court order sanctioning the sale.

The respondent never obtained that Court order and we consider that this omission was not due to lack of trying. She responded to her obligation quick enough by filing the Originating Summons to obtain the leave to sell the land in 1979 but further proceedings were thwarted by:

(1) the contents of the Kadhi's Certificate issued in March 1980 which reduced the property capable of being sold.

(2) the attempts at trying to reach a compromise to ensure that the agreement could be specifically enforced. This included negotiations to get Bait-ul-Mal to agree to sell its ¼ share at a price acceptable to the appellant.

(3) the compulsory acquisition of the whole land which commenced on 11 November 1993 when the preliminary notice, Form A, issued under s. 4 of the Land Acquisition Act, 1960 was gazetted. This sealed the fate of the agreement as the respondent contends that it has been frustrated on the grounds that it was impossible to perform, a contention that was upheld by the trial Judge.

The doctrine of frustration which has since received statutory recognition in our Contracts Act 1950 at s. 57(2) reads as follows:

(2) A contract to do any act, which after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Visu Sinnadurai in his book on the *"Law of Contract in Malaysia and Singapore – Cases and Commentary"* had this to say when dealing with the doctrine of frustration at p. 487.

The Act does not define the word "impossible". However it appears that the wording of the section envisages two main instances of frustration – when a contact to do an act becomes (a) impossible or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore it should be some event which the promisor could not prevent, as a "self-induced frustration" does not discharge a party of his contractual obligation.

The applicability of the doctrine was also discussed in the case of *Ramli bin Zakaria & Ors. v. Government of Malaysia* [1982] 2 MLJ 257 where at p. 262, the Federal Court after referring to a number of English authorities expressed its views of the doctrine in the following manner.

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible as it is not discharged by frustration.

Applying that test it is clear that the compulsory acquisition that occured in the instant case took place 14 years after the agreement was executed, an event that could not have been contemplated by the parties.

We next ask ourselves whether the acquisition of the land had radically changed the obligation of the respondent to sell the ½ share of the land to the appellant. We answer this in the affirmative as what was agreed and intended by the parties and affirmed by the agreement is a transfer of a ½ share of the property from the respondent to the appellant by way of a sale. When the land was compulsorily acquired and compensation awarded, the subject matter of the agreement ceased to exist and performance of the agreement became impossible. For that reason we consider that the compulsory acquisition of the land had frustrated the agreement as to discharge both the appellant and respondent of their obligations under the agreement. That same issue was raised in the Singapore case of *Lim Kim Soon v. Sheriffa Taribah bte Abdul Rahamn* [1994] 1 SLR 44 and when invoking the doctrine of frustration, LP Thean JA had this to say.

> In our judgment, (adopting the words of Lord Radcliffe [in Davis Contractors at p. 729] the occurrence of the unexpected event, i.e. the commencement of the process of compulsory acquisition, had altered fundamentally the 'face of things' and there was such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. In our judgment, this case is an appropriate one for the invocation of the doctrine.

Likewise since the subject matter of the agreement before us has been taken away and replaced by way of compensation payable can the appellant claim such compensation as being due and payable to him? We say 'no' for the very reason that the basis of the appellant's claim is dependent on the agreement but since we have already ruled that such an agreement is now void under s. 57(2) of the Act, the respondent cannot claim any right to such compensation. At most he is entitled to be refunded the 10% deposit he had paid to the respondent under s. 66 of the Act which provides that any person who has received an advantage under an agreement which is later discovered to be void is obliged to return such advantage or compensate for it to the person he received it. It is for this reason that the appellant is entitled to be

refunded the 100% deposit he had made to the respondent pursuant to clause 1 of the agreement.

For the reasons that we have given, we had dismissed this appeal with costs, affirmed the decision of the High Court and ordered that the deposit for costs made by the appellant be paid to the respondent to account of her taxed costs.

Reported by W.A. Sharif